Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-649

BERNARD L. AVCOLLIE,

Petitioner,

vs.

STATE OF CONNECTICUT

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

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vs.

STATE OF CONNECTICUT

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

BRIEF FOR RESPONDENT IN OPPOSITION

The respondent State of Connecticut respectfully prays that the Petition for a Writ of Certiorari be denied.

OPINIONS BELOW

The petitioner has set forth in his appendices A and B the opinions of the Connecticut Supreme Court. In addition the respondent reproduces as appendices A, B, and C to this brief the orders of the Connecticut Supreme Court staying the entry of judgment and further proceedings in the trial court pending action on this petition.

JURISDICTION

The decision of the Connecticut Supreme Court was rendered on July 24, 1979. Entry of the judgment of convictions, sentencing and any other proceedings in the trial court have, however, been stayed. The petitioner still retains the right to a direct appeal to the Connecticut Supreme Court following the rendition of that judgment and sentencing, an appeal which might result in reversal of this conviction on other grounds thus rendering the issues raised in this petition moot. In light of these facts the finality required by 28 UNITED STATES CODE, Section 1257 does not currently exist.

QUESTIONS PRESENTED

1. Does the Double Jeopardy Clause bar a State appeal from a judgment of acquittal entered by the trial judge after the trial jury returned a verdict of guilty where reversal does not require a retrial?

2. Does *Jackson* v. *Virginia,* —U.S.—, 61 L. Ed. 2d 560 (1979) require reversal of petitioners conviction?

STATEMENT OF THE CASE

The defendant, an attorney, was on trial before a jury on an indictment charging him with the murder of his wife.

Evidence had been introduced by the State to establish, if believed by the jury, that Mrs. Avcollie, whose body was found in the Avcollie swimming pool, shortly after 2:00 AM on October 30, 1975, was strangled to death and the victim of a homicide.

The State's medical experts testified clearly and unequivocally that death was due to strangulation and not drowning. These witnesses testified at length concerning the basis for this conclusion.

The defendant had claimed his wife left his house and walked towards a neighbor's house between 12:00 and 12:30 AM that morning, after an argument and physical struggle between them. The defendant also claimed his wife was "very obviously" under the influence at that time and had been drinking and taking pills, some of which were found scattered about the sink in the defendant's master bedroom bathroom.

The State introduced medical evidence (stomach contents and drug blood-liver levels) that Mrs. Avcollie was killed at a time earlier than 12:00 AM when, by his own admission, the defendant was alone and fighting with Mrs. Avcollie at their home. The medical evidence also established Mrs. Avcollie had very small amounts of alcohol and drugs in her body when she died and was not intoxicated.

The defendant, the evidence showed, was in love with another woman and only a week before his wife's death, with that other woman, had looked at expensive homes large enough to accomodate both his children and those of his girlfriend.

It was further shown, in contradiction to the defendant's earlier statement, that he drove his automobile into his driveway, a light went on, and he was seen carrying a large object in both his arms after leaving the car. This occurred before he called his neighbors

and started the search for his wife about 1:30 AM. In his testimony, the defendant did admit driving the vehicle but denied carrying anything after he left the car.

The defendant's version of his use of the vehicle was that he used the car to search the street and adjacent streets for his wife. However, other witnesses disputed this and he had admittedly omitted this episode in his detailed statements about his activities that night. He, in fact, denied going out looking for his wife when asked by a witness that evening.

When the State attempted to introduce evidence of the contents of the trunk of the defendant's automobile which contained a small quantity of human blood, human head hairs having 21 out of 22 characteristics of Mrs. Avcollie's head hairs, and black and white rayon wheel cover fibers microscopically similar to the fibers found on Mrs. Avcollie's jacket, the trial court sustained the defendant's objection that such evidence was prejudicial, speculative and inflammatory. The jury did hear testimony, however, that the jacket Mrs. Avcollie was wearing had been in the trunk of the defendant's car shortly before and had not been cleaned before Mrs. Avcollie's death, that the automobile had a trunk light, and it was after the automobile was driven into the driveway that the frenzied barking of dogs near the Avcollie home was heard.

The case was submitted to the jury on the charge of murder, the trial court refusing, at the defendant's request, to instruct the jury on the lesser offense of manslaughter.

The jury thereafter returned a verdict of guilty.

After the foreman announced the verdict in open court, the defendant moved that the jury be excused and then his motions previously made, including a motion to set aside the verdict, be granted. The Court then ordered the verdict set aside and ordered an acquittal. In so doing, the trial judge stated he was acting as "one who probably could be called the thirteenth juror."

The trial judge told the jury he was setting aside their verdict "either because you did not understand the charge or you did not weigh all of the evidence properly." Previously the court had stated concerning its intention to set aside the verdict:

> "I realize that this is a case of circumstantial evidence but even cases of circumstantial evidence must be proven beyond a reasonable doubt.
>
> As I have said before, and I have said it in my charge on several occasions and I repeat it. The law never permits inferences to be drawn or assumptions depending upon other inferences or assumptions."

Thereafter the state appealed to the Connecticut Supreme Court which reversed the trial judge and remanded with directions to render a judgment of guilty and impose sentence. In its opinion the Connecticut Supreme Court stated the jury could draw an inference from the facts they found as the result of other inferences.

ARGUMENT

I.

THE DECISION OF THE SUPREME COURT OF CONNECTICUT IS NOT A FINAL JUDGMENT

The petitioners application for this writ has resulted in a stay of all further proceedings in the trial court. No judgment of conviction has been entered in the trial (Superior) court nor has the petitioner been sentenced. When these actions are taken the petitioner will have the right to a direct appeal of that conviction to the Connecticut Supreme Court. Were it successful, such an appeal would render moot the issues raised in this petition. This court has adopted a policy against "interference with the state proceedings when the dispute may be otherwise resolved." *Costavelli* v. *Massachusetts,* 421 U. S. 193, 197 (1975). This policy would appear to militate against the granting of this writ at this time. Because no retrial will result from the remand in this case the situation is not one where the petitioner will have his rights under the Double Jeopardy Clause significantly undermined by postponing consideration until after judgment,sentencing and direct appeal. Petitioner will not be forced to undergo a forbidden second trial, the harm which was a significant basis of this courts holding as to finality in *Abney* v. *U. S.,* 431 U. S. 651 (1977).

II.

THIS CASE DOES NOT PRESENT AN ISSUE MERITING REVIEW ON CERTIORARI

A.

DOUBLE JEOPARDY ISSUE

This court has previously given clear guidance to the Courts of Appeals and the appellate courts of the States concerning the double jeopardy issue raised by the petitioner.

In *United States* v. *Ceccolini,* 435 U. S. 268 (1978) at page 270-271 the following appears:

> "That court [The Second Circuit Court of Appeals] rightly concluded that the government was entitled to appeal both the order granting the motion to suppress and the order setting aside the verdict of guilty [because the trial judge concluded that without the suppressed evidence there was insufficient evidence of respondents guilt], since further proceedings if the government were successful on the appeal would not be barred by the Double Jeopardy Clause. . . . The District Court had sensibly first made its finding on the factual question of guilt or innocence, and then ruled on the motion to suppress; a reversal of these rulings would require no further proceedings in the District Court, but merely a reinstatement of the finding of guilt."

United States v. *Wilson,* 420 U. S. 332, 352-353 (1975) and *United States* v. *Jenkins,* 420 U. S. 358 (1975) [overruled on other grounds, *U. S.* v. *Scott,* 437 U. S. 82 (1978)] both give clear guidance that where no retrial is required a government appeal does not run afoul of the Double Jeopardy Clause. In *United States* v. *Scott, supra,* both the majority and dissenting opinions recognized the continuing vitality of the principal that in the absence of the need for a retrial no double jeopardy bar to a government appeal exists. *United States* v. *Scott, supra* at page 92 n. 7 and at pages 105-106. As pointed out in this Court's opinions, a second trial for the same offense, with its attendant increased anxiety, expense and risk is what the Double Jeopardy Clause protects against. In the absence of the need for a retrial it is submitted that the Double Jeopardy Clause does not apply. *United States* v. *Wilson, supra* at page 336; *United States* v. *Martin Linen Supply,* 430 U. S. 564, 568-570 (1977); *Sanabria* v. *United States,* 437 U. S. 54, 63-64 (1978).

The Federal Courts of Appeals which have considered the issue raised by petitioner have unanimously supported the respondent's view of the applicability of the Double Jeopardy Clause to government appeals under these facts. *U. S.* v. *DeGarces,* 518 F. 2d 1156 (2nd. Cir. 1975); *U. S.* v. *Ceccolini,* 542 F. 2d 136, 140 (2nd. Cir. 1976), rev. on other grounds 435 U. S. 268 (1978); *U. S.* v. *Hannah,* 584 F. 2d 27, 28 (3rd. Cir. 1978); *U. S.* v. *Cahalane,* 560 F. 2d 601, 602-604 (3rd. Cir. 1977), Cert. Den. 434 U. S. 1045 (1979); *U. S.* v.*Moore,* 586 F. 2d 1029, 1032 (4th. Cir. 1978); *U. S.* v. *Mandel,* 591 F. 2d 1347, 1374-1375 (4th. Cir. 1979); *U.S.* v. *Burns,* 597 F. 2d 939, 940-941 (5th. Cir. 1979); *U. S.* v. *Cravero,* 530 F. 2d 666, 669 (5th. Cir. 1976); *U. S.* v. *Jones,* 580 F. 2d 219, 221-222 (6th. Cir. 1978); *U. S.* v. *Blasco,* 581 F. 2d 681 (7th. Cir. 1978), Cert. Den. —U. S.—, 99 S. Ct. 456 (1979); *U. S.* v. *Allison,* 555 F. 2d 1386-1387 (7th. Cir. 1977); *U. S.* v. *Donahue,* 539 F. 2d 1131, 1133-1134 (8th. Cir. 1976); *U. S.* v. *Hemphill,* 544 F. 2d 341, 343 (8th. Cir. 1976), Cert. Den. 430 U. S. 467 (1977); *U. S.* v. *Rojas,* 554 F. 2d 938, 941-943 (9th. Cir. 1977); *U. S.* v. *Calloway,* 562 F. 2d 615, 616-617 (10th. Cir. 1977); *U. S.* v. *Quarry,* 576 F. 2d 830, 832-833 (10th. Cir. 1978).

A number of state appellate courts have reached the same conclusion as the Connecticut Supreme Court and the Federal Courts of Appeals. *People* v. *Gennings,* 583 P. 2d 908, 910 (Colorado 1978); *State* v. *Kleinwaks,* 68 N. J. 328, 345 A. 2d 793 (1975); *State* v. *Lynch,* 79 N. J. 327, 399 A. 2d 629, 635-636 (1979); *People* v. *Leach,* 57 A.D. 2d 332, 394 N.Y.S. 2d 722 (N.Y. Supreme Court App. Div. 2nd. Dept. 1977), Affirmed on opinion below 46 N.Y. 2d 821, 414 N.Y.S. 121 (N.Y. Ct. of Appeals 1978).

B.

THE *JACKSON* v. *VIRGINIA* CLAIM

Petitioner's reliance on this court's holding in *Jackson* v. *Virginia,* — U. S.—, 61 L. 1d. 2d 560 (1979) is not appropriate.

A careful reading of that case reveals that it worked no change in the measure of evidence sustaining a criminal conviction. That case fully recognized that:

> ". . . [O]nce a defendant has been found guilty of the crime charged, the fact finder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution."

and that:

> "The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

and further:

> ". . . this inquiry does not require a court to 'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.' " *Jackson* v. *Virginia, supra* at 61 L. Ed. p. 573.

The thrust of the decision in *Jackson* was to extend the existing law and make it applicable to Federal habeas review of state convictions in place of the former "no evidence" rule.

In this case the state's medical witnesses testified that it was determined or concluded that Mrs. Avcollie was strangled, not that she might have been, or was likely to have been.

Petitioner argues his claim under *Madore* v. *New Departure Mfg. Co.,* 104 Conn. 709, 134 A. 259 (1926). That case has been limited by the Connecticut Supreme Court to situations where the expert testimony was clearly equivocal and was the only evidence on which the trier of fact could rely. The trier of fact still remains free, even where the scientific evidence is equivocal,

which it is not here, to look to the other evidence for clarification and illumination. *Humphrys* v. *Beach,* 149 Conn. 14, 19-20, 175 A. 2d 363 (1961).

In this case the jury had substantial physical evidence concerning the strangulation of Mrs. Avcollie. The autopsy revealed that a necklace worn around her neck had been bent and compressed causing injury to the skin beneath it. Deep internal injuries within the neck corresponding to those on the outer skin were discovered about either side of the thyroid cartilage and the spine. Small hemorrhages from pressure on the cervical blood vessels were observed in the eyes. All of these were photographed and the photographs were before the jury. The significance of each finding was explained in detail by the expert witnesses. A defense expert conceded that there was evidence of compression of the neck jewelry around the entire circumference of the neck. An additional autopsy finding presented to the jury was that there was no evidence of water in the lungs despite the fact that the deceased was found in a swimming pool.

The jury was entitled to evaluate *all* of the evidence in reaching a conclusion as to the manner of Mrs. Avcollie's death. There was ample evidence from which they could reasonably conclude, beyond a reasonable doubt, that she was strangled and the victim of a murder and not drowned as claimed by the defendant's experts.

CONCLUSION

For the reasons stated Respondent urges that the Petition be denied.

RESPECTFULLY SUBMITTED,
THE STATE OF CONNECTICUT

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APPENDIX

APPENDIX A

SUPREME COURT
STATE OF CONNECTICUT

No. 8747	No. 12468
STATE OF CONNECTICUT	SUPERIOR COURT
vs.	JUDICIAL DISTRICT OF WATERBURY
BERNARD AVCOLLIE	JULY 26, 1979

ORDER CONCERNING STAY OF EXECUTION

In the above entitled matter, the defendant Bernard Avcollie, by his attorney, John D. Jessep, having filed a Motion for Stay of Execution of Sentence and Continuance of his release on his own recognizance, see *State* v. *Avcollie,* 174 Conn. 100, 109, pending decision on a Petition for Certiorari to the United States Supreme Court, and it appearing that there is reasonable cause to grant the motion for a stay, the motion is granted and execution and enforcement of the judgment in the case is stayed until October 15, 1979, or the sooner decision by the United States Supreme Court of the defendant's petition for a Writ of Certiorari, provided that if the said Petition for Certiorari is granted then the stay shall continue until the decision by that court of the issues raised on the defendant's appeal.

This stay is conditioned that he shall abide by the order and decision of the United States Supreme Court and that in the event that the Writ of Certiorari shall be denied or that his appeal is decided adversely to him, he will promptly thereupon surrender to the sheriff for the Judicial District of Waterbury.

Counsel for the defendant, John D. Jessep, is directed to give prompt notice to the clerk of the Superior Court for the Judicial District of Waterbury and to the Office of Chief State's Attorney,

Austin J. McGuigan, and the Office of State's Attorney, Francis M. McDonald, Jr., of the receipt of any decision by the Supreme Court of the United States on the defendant's Petition for Certiorari.

Chief Justice
CONNECTICUT SUPREME COURT

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APPENDIX B

No. 8747

STATE OF CONNECTICUT	SUPREME COURT
vs.	STATE OF CONNECTICUT
BERNARD AVCOLLIE	OCTOBER 15, 1979

ORDER

The defendant's motion for modification of stay, dated October 12, 1979, having been presented to the Honorable John P. Cotter, Chief Justice, it is hereby

ORDERED that the stay entered by the *court* on July 26, 1979 in the above captioned matter shall continue until further order of the court.

That on October 24, 1979, the *court* shall reconsider the instant motion without entertaining oral argument by counsel:

That further memoranda in support or in opposition to the instant motion sshall be filed no later than October 22, 1979 with the court.

Chief Justice
CONNECTICUT SUPREME COURT

APPENDIX C

No. 8747

STATE OF CONNECTICUT	SUPREME COURT
vs.	STATE OF CONNECTICUT
BERNARD AVCOLLIE	OCTOBER 24, 1979

ORDER ON MOTION FOR MODIFICATION OF STAY

On July 26, 1979, the Connecticut Supreme Court granted the defendant a stay of execution until October 15, 1979 to obtain review by the United States Supreme Court.

This court upon representation by the defendant that a petition for certiorari has been filed on October 24, 1979, hereby modifies its earlier order to the extent that an extension of time is granted to the defendant by the Supreme Court of Connecticut until two weeks after a decision has been rendered by the United States Supreme Court on the defendant's petition for a writ of certiorari.

By the Court

_____

Chief Justice

CONNECTICUT SUPREME COURT